STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of BENNETT, Minors.

UNPUBLISHED
April 24, 2014

No. 316348
Manistee Circuit Court
Family Division
LC No. 11-000001-NA

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating his parental rights to two minor children[1] On appeal, respondent only contests the lower court's finding that petitioner made reasonable efforts to preserve and reunify the family. He does not challenge the particular statutory grounds upon which the court justified its termination decision. Nor does he contest the court's best-interests determination. We affirm.

This Court reviews for clear error the findings and determinations of the trial court in termination proceedings. MCR 3.977(K); *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Moss Minors*, 301 Mich App 76, 80; 836 NW2d 182 (2013) (internal citation and quotation marks omitted).

Generally, before terminating a parent's parental rights, the petitioner is required to "make reasonable efforts to rectify conditions, to reunify families, and to avoid termination of parental rights." *In re LE*, 278 Mich App 1, 18; 747 NW2d 883 (2008); MCL 712A.19a(2). The petitioner is required to prove its efforts were reasonable by a preponderance of the evidence, as that standard is the default burden of proof when a statute is silent on the burden of proof. See *In re Moss Minors*, 301 Mich App at 90, n 2; see also *Residential Ratepayer Consortium v Pub Serv Comm'n*, 198 Mich App 144, 149; 497 NW2d 558 (1993). The services offered by the petitioner to a respondent in a prior removal action may be considered by the court in determining whether the petitioner complied with its statutory obligation to provide reasonable efforts to the respondent. See, generally, *In re Plump*, 294 Mich App 270, 273; 817 NW2d 119 (2011).

[1] The mother of the children is not participating in this appeal.

"While the DHS has a responsibility to expend reasonable efforts to provide services to secure reunification, there exists a commensurate responsibility on the part of respondents to participate in the services that are offered." *In re Frey*, 297 Mich App 242, 248; 824 NW2d 569 (2012). Respondents are required to demonstrate a benefit from, not mere compliance with, the services offered to them. *Id.* at 246-248. A respondent's initiative or participation with services, or lack thereof, is irrelevant in determining the reasonableness of the services offered to the respondent. See, e.g., *In re Fried*, 266 Mich App 535, 543; 702 NW2d 192 (2005).

Respondent first contends that petitioner's services were unreasonable because they did not explicitly take into consideration his blindness, as required by the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*. The ADA requires the petitioner "to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services. Thus, the reunification services and programs provided by the [DHS] must comply with the ADA." *In re Terry*, 240 Mich App 14, 25; 610 NW2d 563 (2000). The Michigan Juvenile Code implicitly adopted the reasonable-accommodations requirement in the ADA by requiring that the petitioner's efforts be reasonable. *Id*. at 25-26. "In other words, if the [DHS] fails to take into account the parents' limitations or disabilities and make any reasonable accommodations, then it cannot be found that reasonable efforts were made to reunite the family." *Id*. at 26.

"Any claim that the [DHS] is violating the ADA must be raised in a timely manner, however, so that any reasonable accommodations can be made." *Id*. If the parent fails to raise the issue in a timely fashion, he or she has effectively waived the error as a ground for obtaining relief from an order terminating the parent's parental rights. See, generally, *id*. As this Court stated:

> Where a disabled person fails to make a timely claim that the services provided are inadequate to [his or] her particular needs, [he or] she may not argue that petitioner failed to comply with the ADA at a dispositional hearing regarding whether to terminate [his or] her parental rights. In such a case, [his or] her sole remedy is to commence a separate action for discrimination under the ADA. At the dispositional hearing, the family court's task is to determine, as a question of fact, whether petitioner made reasonable efforts to reunite the family, without reference to the ADA.
>
> In the present case, respondent did not raise a challenge to the nature of the services or accommodations offered until her closing argument at the hearing regarding the petition to terminate her parental rights. This was too late in the proceedings to raise the issue. The time for asserting the need for accommodation in services is when the court adopts a service plan, not at the time of a dispositional hearing to terminate parental rights. [*Id*. at 26-27.]

In this case, the record establishes that petitioner did make accommodations for respondent's blindness. Petitioner provided respondent with audio recordings of his services plans. Respondent's blindness was included in his case-services plan, and he was already receiving assistance with his blindness from the Michigan Commission for the Blind. Respondent was provided with an "Apollo Reader," a tool designed to enlarge words so that

partially blind individuals can read. These accommodations were reasonable in light of defendant's disability. Respondent does not identify where he requested additional accommodations for his blindness that went ignored by petitioner or the court. Thus, he has waived any right to seek relief from the termination order based on this effectively unpreserved ground. Moreover, as addressed below, the court did not terminate respondent's parental rights because he failed to complete services that required adequate vision. Rather, his rights were terminated due to parenting defects unrelated to his poor vision, and these defects could not be cured even if he had perfect vision. Accordingly, respondent cannot obtain relief from the order based on the alleged inadequacy of the accommodations for his blindness.

Respondent next raises a general challenge to the sufficiency of petitioner's offered services. He contends that his recent progress in his case-services plan, coupled with his long-term compliance, required petitioner to provide additional services before terminating his parental rights to the children. However, he offers no legal support to establish that a petitioner fails to make reasonable efforts if it does not provide additional services after the respondent participates in, or completes, his or her current services. Under Michigan law, petitioner is only required to make *reasonable* efforts to rectify the conditions at issue. In turn, respondents are required to demonstrate improvement from services, rather than mere participation in services. *In re Frey*, 297 Mich App at 246-248. Accordingly, if the respondent parent fails to demonstrate improvement from services and there is no reason to believe that additional services would succeed where the offered services failed, it stands to reason that those additional services are not a necessary component of petitioner's obligation to provide reasonable services to the respondent. Such services would be an unreasonable waste of resources and time.

Throughout these proceedings, respondent's primary parenting deficiency was his lack of parenting skills. In its opinion, the court found that respondent lacked the capacity to provide for the physical and emotional needs of the children, largely due to his poor cognition rather than his blindness. The court mentioned respondent's two-year absence from one of the children, his observed emotional distance from the children during parenting time sessions, and his consistent abdication of his parenting responsibilities to other people, including the children's unstable mother. The court acknowledged that respondent improved his living conditions, participated in parenting time with the children, took parenting classes, and had the potential to provide for the material needs of the children with the assistance of his fiancée, notwithstanding his blindness. However, the court ultimately found that these services failed because respondent could only provide an "intermittent, peripheral father relationship [with a] continued low level of involvement in the proper care and socialization of the children." It acknowledged that, in light of his past behavior and his psychological evaluations indicating his poor prognosis to become a proper parent, respondent was unlikely to become an appropriate parent for the children. Thus, the court implicitly found that respondent's principal barrier to reunification was his inadequate parenting skills, and it proceeded to find that the statutory grounds for termination were satisfied based on this deficit.

Respondent's problem in this case was not his lack of participation with services; it was his lack of improvement from those services. The record is replete with evidence of services provided by petitioner to address his lack of parenting skills. His initial parent-agency treatment plan indicated that petitioner made referrals for respondent to receive counseling services, a psychological evaluation, and weekly parenting classes. During a review hearing, Heather

Saya,[2] the foster-care worker for the family, indicated that respondent had received approximately 15 certificates for completing parenting-time programs over the years. During the termination hearing, she testified that respondent was provided with psychological evaluations, counseling services, and parenting classes in the current child-welfare action. However, she claimed that respondent refused counseling services because he thought that they were unnecessary. She indicated that between 2001 and 2005 respondent was provided with a litany of parenting-skills services, including the following: (1) Early On, (2) Infant Mental Health, (3) an in-home parent educator, (4) the Family Reunification Program, (5) the Family Resource Program, (6) the Teen Parent Program, (7) Prevention, (8) Great Beginnings Daycare, and (9) infant-support services. She also claimed that respondent received additional services from 2007 until the filing of the removal petition in 2011; they included: (1) the Family Advocate Program, (2) Families First, (3) Association of Children's Mental Health, (4) Prevention, (5) psychological evaluations, (6) mental-health services, and (7) parenting time. Thus, for many years preceding removal, respondent was provided significant parental-support services. Saya noted that respondent and the children's mother "essentially have been provided every service that Manistee County has to offer," opining that further services would be unreasonable in light of respondent's history and his psychological evaluations. She further noted that respondent mostly refused to participate in services in the prior actions, and that he had not demonstrated any substantial progress in his parenting skills since the children came into care in 2011.

Moreover, respondent's psychological evaluations indicated that his prognosis for long-term improvement in his parenting skills was very low. Dr. Steve Osborn, a psychologist, testified that respondent's primary problem was not his cognition, but rather a personality disorder. He reported that he could not specify respondent's personality disorder, but indicated that respondent had one, with strong traits of narcissism and dependency. Dr. Osborn indicated that, based on his personal observations and respondent's historical failure to benefit from services, respondent was unlikely to make substantial progress in his parenting skills, such that additional services would be unproductive. Dr. Eric Harvey, another psychologist, also evaluated respondent, indicating that respondent was unlikely to improve his parenting skills because he had not demonstrated any real improvement between 2001 and 2012. He also opined that respondent would always present parenting challenges due to his difficulty with abstract thinking. Harvey indicated that respondent still does not appreciate the needs of his children, reflecting that respondent's dependency traits would likely make him "turn to others to do maybe the more difficult parts of the parenting."

The lower court did not clearly err in finding, by a preponderance of the evidence, that petitioner made reasonable efforts to rectify the conditions at issue and to reunify the family. From 2001 to 2012, respondent received numerous services designed to improve his inadequate parenting skills. The record establishes that, in the current case, petitioner offered respondent yet another set of parenting classes, psychological evaluations, and counseling sessions in attempting to rehabilitate his longstanding deficient parenting skills. The hearing testimony established that respondent had not demonstrated any marked improvement since the children came into care in

[2] It appears that Saya changed her last name to "Randle" during the proceedings.

2011, and his psychological evaluations evidenced strong doubt over his long-term prognosis for improvement. Thus, providing respondent with even more parental-support services was not required.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro